



UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION

In re:	)	Case No. 09-37635-B-13J
	)	
HENRY APODACA,	)	
	)	
Debtor(s).	)	Adversary No. 11-02093-B
	)	
<u>HENRY APODACA,</u>	)	DCN MFO-2
	)	
Plaintiff(s),	)	
	)	
vs.	)	Date: July 12, 2011
	)	Time: 09:32 a.m.
JP Morgan Chase Bank, N.A.,	)	Place: U.S. Courthouse
Chase Home Finance, LLC, Long	)	Courtroom 32
Beach Mortgage Company,	)	501 I Street
William G. Malcolm, and Does	)	Sacramento, CA 95814
1-10,	)	
Defendant(s).	)	

**MEMORANDUM DECISION ON MOTION TO DISMISS**

This matter came on for final hearing on July 12, 2011, at 09:32 a.m. Appearances are noted on the record. At the conclusion of the hearing the court took the matter under submission. The following constitutes the court's findings of fact and conclusions of law, pursuant to Federal Rule of Bankruptcy Procedure 7052.

**DECISION**

The motion is granted in part and denied in part to the extent set forth herein. The first, second, fourth and fifth claims for relief set forth in the initial complaint (the "Complaint") filed on February 8, 2011 are dismissed as to moving defendants JPMorgan Chase Bank, N.A. ("JPMorgan") and Chase Home Finance, LLC ("Chase," and,

1 collectively with JPMorgan, the "Moving Defendants")<sup>1</sup> with leave to  
2 amend. The third claim for relief for violation of 11 U.S.C. § 362(k)  
3 is dismissed as to all defendants without leave to amend. All claims  
4 for relief set forth in the Complaint are dismissed as to defendant  
5 Long Beach Mortgage Company ("Long Beach") without leave to amend. On  
6 or before October 26, 2011 the plaintiff shall file a first amended  
7 complaint that is consistent with this ruling. If the plaintiff  
8 wishes to include in the complaint claims for relief against Long  
9 Beach the plaintiff shall file a motion requesting permission to  
10 include those defendants in the first amended complaint, shall file  
11 and serve said motion on or before October 18, 2011, and shall set  
12 said motion on the first available calendar which provides proper  
13 notice to parties in interest. If filed, the motion to amend shall  
14 include as an exhibit an unfiled copy of amended complaint the  
15 plaintiff wishes to file as to Long Beach. If filed, the motion to  
16 amend will also toll the October 26, 2011 deadline for filing the  
17 first amended complaint set forth above pending the resolution of the  
18 hearing on the motion to amend.

#### 19 **FACTUAL BACKGROUND**

20 By this motion the Moving Defendants move for dismissal of this  
21 adversary proceeding under Fed. R. Civ. P. 12(b)(6), made applicable  
22 to this adversary proceeding by Fed. R. Bankr. P. 7012.

23 The Complaint alleges five causes of action for 1.) Declaratory  
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25 <sup>1</sup>The Complaint confusingly refers to JPMorgan Chase Bank as  
26 both "Chase" and JPMorgan. See Compl. ¶¶ 11 and 23. The  
27 Complaint also refers to Chase Home Finance, LLC as "Chase." See  
28 Compl. ¶ 12.

1 Relief, 2.) Violation of 11 U.S.C. § 362(a), 3.) Violation of 11  
2 U.S.C. § 362(k)(1), 4.) Violation of the Real Estate Settlement  
3 Procedures Act ("RESPA"), and 5.) Civil Conspiracy.

4 The Complaint bases its claims for relief on the following  
5 alleged facts. The plaintiff debtor Henry Apodaca ( the "Debtor")  
6 owns real property located at 1025 Milton Street, West Sacramento, CA  
7 95605 (the "Property"). The Property is the Debtor's personal  
8 residence. On March 13, 2006, the Debtor executed a promissory note  
9 (the "Note"). payable to the order of Long Beach Mortgage Company  
10 ("Long Beach"). The Note was secured by a deed of trust (the "Deed of  
11 Trust") in the Property. The Note provided for monthly payments over  
12 a period of thirty years.

13 The Debtor commenced this chapter 13 bankruptcy case (the  
14 "Bankruptcy Case") on August 19, 2009. JPMorgan filed a secured claim  
15 (the "Claim") in the Bankruptcy Case on November 5, 2009. The Claim,  
16 as initially filed, claimed a balance of \$237,078.57, and included a  
17 claim for \$25,331.26 in pre-petition arrears. According to the Claim,  
18 the pre-petition arrears were attributable to five missed monthly  
19 payments of \$1,591.68 and eight missed monthly payments of \$2,016.41.  
20 JPMorgan later amended the Claim on December 2, 2009 (the "Amended  
21 Claim"). The Amended Claim is filed in the amount of \$237,078.57.  
22 The Amended Claim includes a \$20,691.84 claim to pre-petition arrears,  
23 which, according to the Amended Claim, reflect thirteen missed  
24 payments of \$1,5901.68. Compl., ¶ 30. The Debtor alleges that by  
25 filing the Claim, JPMorgan asserted that it had obtained rights in the  
26 Note and Deed of Trust from Long Beach. The Debtor alleges upon  
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1 information and belief that JPMorgan actually did not obtain any  
2 rights in the Note or Deed of Trust, because it did "not provide  
3 either an assignment of either the ownership nor Servicing rights" to  
4 the Debtor "as required by law." Compl. ¶ 31.

5 The Debtor confirmed a chapter 13 plan in the Bankruptcy Case on  
6 November 5, 2009. The Debtor confirmed a modified plan in the  
7 Bankruptcy Case on September 10, 2010. The plan provided for payment  
8 of the obligation underlying the claim with an ongoing monthly payment  
9 of \$1,606.85 and payment of a total of \$21,000.00 in pre-petition  
10 arrears.

11 The Debtor alleges that "Defendant, as a matter of normal  
12 business practice, conducts an 'Escrow Analysis' pursuant to RESPA  
13 upon notice of a bankruptcy filing." Compl., ¶ 37. An escrow  
14 analysis allegedly analyzes the advances made by the lender in the  
15 twelve months prior to the bankruptcy filing for the purposes of  
16 paying of property taxes, insurance and other costs related to the  
17 security for a loan and projects those costs into the future in order  
18 to determine the amount that the borrower will be required to pay for  
19 those costs in the future. The escrow analysis also allegedly  
20 compares the amounts advanced by the lender for these costs to the  
21 amounts paid into an escrow account by the borrower for payment of  
22 those costs; if the result shows that the lender has advanced funds in  
23 excess of what the borrower has paid into the escrow account, the  
24 lender will generate a notice of a post-petition increase in the  
25 regular monthly mortgage payment. The increase is allegedly intended  
26 to recoup the advances paid by the Defendant in excess of the payments  
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1 made by the borrower to the escrow account. The notices specifying  
2 the post-petition increases in payments are sent to the debtor  
3 borrower and the chapter 13 trustee.

4 The Debtor alleges that as a result of receiving a notice of a  
5 post-petition payment increase, the chapter 13 trustee takes action  
6 which results in the collection by the trustee of the increased  
7 payment as specified in the lender's notice, which action includes  
8 objections to confirmation or motions to dismiss if the debtor is not  
9 proposing to pay the full amount of the increased payment. The Debtor  
10 alleges that in generating and sending the notices based on post-  
11 petition escrow analyses as described above, the "Defendants" fail to  
12 distinguish between pre- and post-petition escrow advances and  
13 improperly collect on a claim for a pre-petition debt through the  
14 ongoing monthly mortgage payment. The Debtor alleges that this  
15 practice violates the automatic stay of 11 U.S.C. § 362(a).

16 In this case, the Debtor alleges that "Defendants" "have not  
17 provided either an Annual Disclosure Accounting Statement or a Special  
18 Escrow Analysis asserting a resulting negative escrow analysis as  
19 required under the Real Estate Settlement Procedures Act." Compl. ¶  
20 29. Instead, on September 22, 2010 "defendant Chase" allegedly  
21 notified the chapter 13 trustee of post-petition increases in the  
22 monthly loan payment. According to the notice given by "defendant  
23 Chase," the mortgage payment increased from \$1,606.85 to \$1,940.25  
24 effective October 1, 2010. Compl., ¶ 28. The Debtor alleges that the  
25 increase in the monthly mortgage payment constitutes a violation of  
26 the automatic stay of 11 U.S.C. § 362(a) because by increasing the  
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1 monthly mortgage payment the "defendants" are attempting to recover a  
2 pre-petition shortage in the Debtor's escrow account. The Debtor  
3 alleges that this alleged post-petition attempt to recover a pre-  
4 petition debt violates the automatic stay.

5 The Debtor also alleges that the "Defendants" violated RESPA by  
6 (1) failing to notify the Debtor when the note and deed of trust were  
7 transferred; (2) assessing more "risk" in the Defendants' escrow  
8 analysis calculations than is allowed by RESPA; (3) improperly  
9 accessing the escrow account for payment of property taxes and  
10 insurance; (4) failing to credit back charges improperly force-placing  
11 insurance when the Debtor had paid for insurance themselves; and (5)  
12 performing an improper escrow analysis that resulted in incorrect  
13 notices of increase in payments. The Debtor specifically cites 12  
14 U.S.C. § 2604 as the basis for his claims for RESPA violations.

15 Finally, the Debtor alleges that the "assignees and/or successors  
16 in interest" to the note and deed of trust, were assisted and  
17 represented by "Defendants" in a civil conspiracy for the purpose of  
18 recouping pre-petition claims from post-petition estate property  
19 resulting in systematic injury to debtor by means of the allegedly  
20 improper escrow analyses described above, concealing the post-petition  
21 collection of pre-petition claims, and objecting to confirmation of  
22 chapter 13 plans based on the improper escrow analyses.

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**ANALYSIS**The Law Applicable to A Motion to Dismiss

The following sets forth the legal standard for dismissal of a complaint where the complaint fails to state a claim on which relief may be granted:

The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable here under Fed. R. Bankr. P. 7012, is to test the legal sufficiency of a plaintiff's claims for relief. In determining whether a plaintiff has advanced potentially viable claims, the complaint is to be construed in a light most favorable to the plaintiff and its allegations taken as true. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Church of Scientology of Cal. v. Flynn, 744 F.2d 694, 696 (9th Cir.1984). . .

Quad-Cities Constr., Inc. v. Advanta Bus. Servs. Corp. (In re Quad-Cities Constr., Inc.), 254 B.R. 459, 465 (Bankr. D. Idaho 2000).

In addition, under the Supreme Court's most recent formulation of Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1954 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. See Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1964-66 (2007). ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

1 Factual allegations must be enough to raise a right to relief above  
2 the speculative level. Id., citing to 5 C. Wright & A. Miller, Fed.  
3 Practice and Procedure § 1216, at 235-36 (3d ed. 2004) ("[T]he  
4 pleading must contain something more. . . than . . . a statement of  
5 facts that merely creates a suspicion [of] a legally cognizable right  
6 of action").

7 In addition, the court notes the following:

8  
9 A dismissal under Rule 12(b)(6) may be based on the lack of  
10 a cognizable legal theory or on the absence of sufficient  
11 facts alleged under a cognizable legal theory. Navarro v.  
12 Block, 250 F.3d 729, 732 (9th Cir. 2001); Balistreri v.  
13 Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1988). .  
14 . the Court is not required "to accept as true allegations  
15 that are merely conclusory, unwarranted deductions of fact,  
16 or unreasonable inferences." Spewell v. Golden State  
17 Warriors, 266 F.3d 979, 988 (9th Cir. 2001). Courts will not  
18 "assume the truth of legal conclusions merely because they  
19 are cast in the form of factual allegations." Warren v. Fox  
20 Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003);  
21 accord W. Mining Council v. Watt, 643 F.2d 618, 624 (9th  
22 Cir. 1981). Furthermore, courts will not assume that  
23 plaintiffs "can prove facts which [they have] not alleged,  
24 or that the defendants have violated . . . laws in ways that  
25 have not been alleged." Assoc. Gen. Contractors of Cal.,  
26 Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526;



1 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983). . .  
2 Toscano v. Ameriquest Mortg. Co., 2007 U.S. Dist. LEXIS 81884 (E.D.  
3 Cal. 2007).

4 If a Fed. R. Civ. P. 12(b)(6) motion to dismiss is granted,  
5 "[the] court should grant leave to amend even if no request to amend  
6 the pleading was made, unless it determines that the pleading could  
7 not possibly be cured by the allegation of other facts." Lopez v.  
8 Smith, 203 F.3d 1122, 1127 (9<sup>th</sup> Cir. 2000) (en banc), quoting Doe v.  
9 United States, 58 F.3d 494, 497 (9<sup>th</sup> Cir. 1995). In other words, the  
10 court is not required to grant leave to amend when an amendment would  
11 be futile. See Toscano, 2007 U.S. Dist. LEXIS 81884 (citing Gompper v.  
12 VISX, Inc., 298 F.3d 893, 898 (9<sup>th</sup> Cir. 2002)).

13  
14 Dismissal of Long Beach Without Leave to Amend

15 Before turning to an analysis of each of the enumerated claims  
16 for relief set forth in the Complaint, the court first addresses the  
17 inclusion of named defendant Long Beach in the Complaint. The  
18 Complaint identifies Long Beach as the original lender and holder of  
19 the Note, but does not contain any specific allegations relating to  
20 conduct of the Long Beach Defendant with respect to the Debtor's  
21 Bankruptcy Case. Instead, the allegations in the Complaint only  
22 allege that Chase and/or JPMorgan filed the Claim and the Amended  
23 Claim in the Bankruptcy Case. Chase and/or JPMorgan are also the only  
24 named defendants specifically identified as giving notice to the  
25 Debtor of an increase in his monthly mortgage payment. (See Compl., ¶  
26 28). The Complaint alleges that only Chase and/or JPMorgan have taken  
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1 any active role with respect to the Claim and the Amended Claim.

2 To the extent that any conduct of the Long Beach Defendant is  
3 alleged in the Complaint at all, the Long Beach Defendant is only  
4 vaguely and ambiguously identified with the label "Defendants,"  
5 "Defendant" or "defendant." In light of the allegations in the  
6 Complaint which indicate that Chase and JPMorgan are the only named  
7 defendants which have actively sought to enforce the Amended Claim in  
8 this case, the Debtor's vague allegations are insufficient to state  
9 any plausible claim for relief as against the Long Beach.

10 Dismissal of Third Claim for Relief (Violation of 11 U.S.C. §

11 362(k)(1)) Without Leave to Amend

12 The Moving Defendants' request for dismissal with respect to the  
13 third claim for relief is granted, and the claim is dismissed without  
14 leave to amend as to all named defendants, but without prejudice to  
15 the inclusion of a claim for violation of the automatic stay in an  
16 amended complaint, as discussed, infra, in connection with the second  
17 claim for relief.

18 The third claim for relief alleges a violation of 11 U.S.C. §  
19 362(k)(1). Section 362(k)(1), however, does not create a right of  
20 action but governs the available remedies and measure of damages for a  
21 violation of a stay provided by § 362. As a result, because the  
22 Debtor cannot state a claim for a violation of § 362(k)(1), the claim  
23 is dismissed without leave to amend.

24 Dismissal of Chase and JPMorgan With Leave to Amend

25 Having addressed the Debtor's allegations with respect to the  
26 Long Beach Defendant, the court now addresses each of the Debtor's  
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1 first, second, fourth and fifth claims for relief with respect to the  
2 Moving Defendants.

3           1. *First Claim for Relief: (Declaratory Relief)*

4           This claim for relief is dismissed as to the Moving Defendants  
5 with leave to amend.

6           The facts alleged by the Debtor establishes the existence of a  
7 dispute between the Debtor and some, if not all, of the named  
8 defendants regarding the correct amount of the ongoing monthly  
9 payments to be made by the Debtor under his note and deed of trust  
10 obligations, the correct method by which the escrow analysis should be  
11 prepared, and the proper amount of the pre-petition claim based on the  
12 note and deed of trust obligation.

13           The first claim for relief fails, however, to distinguish  
14 adequately among the named defendants with respect to the  
15 aforementioned disputes. The Debtor has not alleged facts supporting  
16 a need for declaratory relief between himself and all of the named  
17 defendants, and, as a result, the defendants have not been given fair  
18 notice of the claims being alleged against each of them. Erickson v.  
19 Pardus, 551 U.S. 89, 93 (2007) (under Fed. R. Civ. P. 8, the plaintiff  
20 need only provide a short and plain statement of the claim for relief,  
21 but must also give the defendant fair notice of the claims being  
22 alleged against it); see also Gauvin v. Trombatore, 682 F.Supp. 1067,  
23 1071 (N.D. Cal. 1988) (allegations lumping all defendants together did  
24 not satisfy Rule 8(a)(2)). The Debtor's allegations that a  
25 controversy exists between him and "Defendants" is insufficient. It  
26 appears, based on the Debtor's general allegations, that his claim for  
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1 declaratory relief is relevant only to the Debtor and either Chase or  
2 JPMorgan, whichever is the current holder of the Amended Claim based  
3 on the Note and Deed of Trust obligation. However, the Debtor is  
4 given leave to amend to clarify the exact nature of the dispute  
5 between himself and each of the named defendants, to the extent such a  
6 dispute exists.

7       2. *Second Claim for Relief (Violation of 11 U.S.C. § 362(a))*

8       This claim for relief is dismissed as to Chase and JPMorgan with  
9 leave to amend.

10       The Moving Defendants argue that the facts alleged by the Debtor  
11 do not constitute a violation of the automatic stay of 11 U.S.C. §  
12 362(a).

13       The recent decision of the Ninth Circuit Bankruptcy Appellate  
14 Panel in In re Zotow, 432 B.R. 252 (9th Cir. BAP 2010). involved  
15 facts similar to those alleged in the instant adversary proceeding.  
16 The Zotows were debtors in chapter 13 who objected to a proof of claim  
17 filed by BAC Home Loans Servicing, LP ("BAC"). The Zotows objected to  
18 BAC's claim on the ground that the Zotows' pre-petition escrow account  
19 shortages should have been listed in the proof of claim. Rather than  
20 include the shortage in the proof of claim, BAC had instead performed  
21 an escrow analysis and had sent the debtors and the chapter 13 trustee  
22 a post-petition notice which indicated an increase in their ongoing  
23 monthly installment payment into the escrow account due to the pre-  
24 petition shortage. The notice stated that it was being furnished for  
25 informational purposes only and should not be construed as an attempt  
26 to collect against the debtors personally. The notice also stated

1 that if the debtors were involved in a chapter 13 proceeding the  
2 debtors were required to obey all orders of the court in the event  
3 that the amount specified in the notice conflicted with any order or  
4 requirement of the court. Based on the notice, the chapter 13 trustee  
5 made several ongoing post-petition installment payments to BAC from  
6 the debtors' plan payments based on the amount of the payments as  
7 specified in the notice. The chapter 13 trustee also objected to  
8 confirmation of the debtors' chapter 13 plan on the ground that the  
9 debtors' proposed plan payment was insufficient to fully fund the plan  
10 based on the increased payment amount set forth in the notice sent by  
11 BAC.

12 The debtors argued that BAC's attempt to collect the escrow  
13 shortage, a pre-petition debt, by increasing the ongoing post-petition  
14 installment payment through the chapter 13 plan rather than including  
15 the escrow shortage in the proof of claim constituted a violation of  
16 the automatic stay. Following an evidentiary hearing the bankruptcy  
17 court concluded that BAC should have included the pre-petition escrow  
18 shortage in its proof of claim, but also found that BAC had not  
19 violated the automatic stay.

20 The BAP affirmed the bankruptcy court's conclusion that BAC had  
21 not violated the automatic stay. As the BAP stated,  
22 the automatic stay does not prevent all communications between a  
23 creditor and the debtor. Morgan Guar. Trust Co. of N.Y. v. Am.  
24 Sav. and Loan Ass'n, 804 F.2d 1487, 1491 (9th Cir.1986); Connor  
25 v. Countrywide Bank, N.A. (In re Connor), 366 B.R. 133, 136  
26 (Bankr.D.Hawaii 2007). Whether a communication is a permissible  
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1 or prohibited one is a fact-driven inquiry which makes any bright  
2 line test unworkable. See Henry v. Assocs. Home Equity Servs.,  
3 Inc., 272 B.R. 266, 278 (C.D.Cal.2002) (whether creditor's  
4 activities involved coercion or harassment is fact-specific  
5 inquiry); Cousins v. CitiFinancial Mortgage Co. (In re Cousins),  
6 404 B.R. 281, 287 (Bankr.S.D.Ohio 2009) (noting that determining  
7 whether a violation of the automatic stay occurs can be  
8 complicated).

9 Zotow, 432 B.R. at 258.

10 The BAP went on to identify prohibited communications as "those  
11 where direct or circumstantial evidence shows the creditors actions  
12 were geared toward collection of a pre-petition debt, were accompanied  
13 by coercion or harassment, or otherwise put pressure on the debtor to  
14 pay. . . . [M]ere requests for payment and statements simply providing  
15 information to a debtor are permissible communications that do no run  
16 afoul of the stay." Id. "In the end, one distinguishing factor  
17 between permissible and prohibited communications is evidence  
18 indicating harassment or coercion. When such evidence is present, a  
19 disclaimer on the communication that it was being sent 'for  
20 informational purposes only' is ineffective." Id. at 259. The BAP  
21 identified three significant facts in Zotow that informed its  
22 conclusion that the post-petition notice sent by BAC did not violate  
23 the automatic stay: (1) the notice was not in the nature of an invoice  
24 and merely set forth the fact of the debt; (2) BAC did not send the  
25 notice with a payment coupon or envelope and without any informational  
26 component; and (3) BAC sent only one notice to the debtors, and the

1 information contained in that notice was information that the debtors  
2 would need to propose a feasible chapter 13 plan. Id. at 259-60. The  
3 Zotow court also found that BAC did not violate the automatic stay by  
4 receiving increased post-petition payments from the chapter 13  
5 trustee.

6 In the instant case, the Debtor merely alleges that JPMorgan or  
7 Chase sent a notice of a post-petition increase in the ongoing monthly  
8 mortgage payment. There are no allegations that support the  
9 proposition that the sending of the single post-petition notice  
10 involved harassment or coercion. Other than the sending of the single  
11 notice regarding a payment increase, the Complaint is devoid of other  
12 allegations which, construed in the light most favorable to the  
13 Debtor, would show coercive or harassing behavior on the part of any  
14 of the Moving Defendants. The court concludes that the alleged facts  
15 are simply insufficient to state a claim for violation of the  
16 automatic stay. The court does not reach the foregoing conclusion  
17 because the sending of a single notice regarding post-petition payment  
18 increases can never be a violation of the automatic stay; the court  
19 does not foreclose the possibility that a creditor's sending of a  
20 notice to a debtor, whether informational or not, may rise to the  
21 level of coercion or harassment. As the Zotow court pointed out,  
22 whether communications are prohibited or permitted or whether they  
23 rise to the level of coercion or harassment are fact-driven inquiries  
24 for which there are no bright-line rules.

25 In addition, the allegations in the Complaint and under the  
26 second claim for relief are not sufficient to state a claim upon which  
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1 relief may be granted because, as with the first claim for relief,  
2 they do not give each of the Moving Defendants and the other named  
3 defendants fair notice of the claims being alleged against them. As  
4 with the first claim for relief, the general allegations in the  
5 Complaint and in the second claim for relief are replete with vague  
6 references to "Defendants," "defendants" and "Defendant," with no  
7 apparent effort made to distinguish between each of the three  
8 defendants named in the caption of the Complaint.

9 As a result, the second claim for relief is dismissed with leave  
10 given to the Debtor to amend the Complaint to specify which of the  
11 named defendants committed the acts which allegedly violated the  
12 automatic stay and, to the extent that they exist, to allege  
13 additional facts regarding the sending of the notice or other acts  
14 committed in violation of the automatic stay.

15 3. *Fourth Claim for Relief (Violation of Real Estate Settlement*  
16 *Practices Act (RESPA))*

17 This claim is dismissed as to the Moving Defendants with leave to  
18 amend.

19 The fourth claim for relief alleges that the "Defendants"  
20 violated RESPA by (1) failing to notify the Debtor when the note and  
21 deed of trust were transferred; (2) assessing more "risk" in the  
22 "Defendants'" escrow analysis calculations than is allowed by RESPA;  
23 (3) improperly accessing the escrow account for payment of property  
24 taxes and insurance; (4) failing to credit back charges improperly  
25 force-placing insurance when the Debtor had paid for insurance  
26 himself; and (5) performing an improper escrow analysis that resulted  
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1 in incorrect notices of increase in payments. However, the Debtor  
2 cites only 12 U.S.C. § 2604 in connection with the claim. Section  
3 2604, however, governs the form and distribution of special  
4 information booklets regarding the nature and costs of real estate  
5 settlement services.

6 In the context of a motion for a more definite statement under  
7 Fed. R. Civ. P. 12(e), the Ninth Circuit has stated, "even though a  
8 complaint is not defective for failure to designate the statute or  
9 other provision of law violated, the judge may in his discretion . . .  
10 require such detail as may be appropriate in the particular case."  
11 McHenry v. Renne, 84 F.3d 1172, 1179 (9th Cir. 1996). Although the  
12 Moving Defendants have filed a motion to dismiss rather than for a  
13 more definite statement, the court finds that McHenry v. Renne is  
14 applicable here, insofar as a motion for a more definite statement and  
15 a motion to dismiss under Rule 12(b)(6) are both concerned with the  
16 sufficiency of the plaintiff's pleading. In this case, the court  
17 dismisses the fourth claim for relief with leave to amend as to the  
18 specific provisions of RESPA that the Debtor asserts were violated by  
19 one or more of the Moving Defendants because RESPA is a complex  
20 statute that covers several sections of Chapter 27 of the United  
21 States Code. Requiring the Debtor to specify the specific provisions  
22 that he believes were violated prevents both the Moving Defendants and  
23 the court from guessing which provisions of RESPA the Debtor believes  
24 the Moving Defendants violated and gives fair notice to all parties  
25 and the court of the claims being asserted.

26 The fourth claim for relief is also dismissed with leave to amend  
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1 because, like the first and second claims for relief, it is replete  
2 with vague references to "Defendants" and "defendants" without any  
3 distinction between the four named defendants in the caption of the  
4 Complaint. The allegations underlying the fourth claim for relief do  
5 not give the remaining defendants fair notice of the claims being  
6 asserted against them. As a result, the fourth claim for relief is  
7 dismissed with leave given to the Debtor to amend the claim to specify  
8 which of the remaining named defendants violated RESPA and the  
9 specific manner in which they violated RESPA.

10 *4. Fifth Claim for Relief (Civil Conspiracy)*

11 This claim is dismissed as to the Moving Defendants with leave to  
12 amend.

13 Civil conspiracy is not an independent tort. Instead it is  
14 "merely a mechanism for imposing vicarious liability; it is not itself  
15 a substantive basis for liability. Each member of the conspiracy  
16 becomes liable for all acts done by other pursuant to the conspiracy,  
17 and for all damages caused thereby." Favila v. Katten Muchin Rosenman  
18 LLP, 188 Cal.App.4th 189, 206 (2010). A civil conspiracy is  
19 "activated by the commission of an actual tort." Applied Equip. Corp.  
20 v. Litton Saudi Arabia Ltd., 7 Cal.4th 503, 511 (1994).

21 In addition, "[t]he basis of a civil conspiracy is the formation  
22 of a group of two or more persons who have agreed to a common plan or  
23 design to commit a tortious act. The conspiring defendants must also  
24 have actual knowledge that a tort is planned and concur in the  
25 tortious scheme with knowledge of its unlawful purpose. However,  
26 actual knowledge of the planned tort, without more, is insufficient to  
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1 serve as the basis for a conspiracy claim. Knowledge of the planned  
2 tort must be combined with intent to aid its commission." Id. (citing  
3 Kidron v. Movie Acquisition Corp., 40 Cal.App.4th 1571, 1582 (1995)).

4 Here, the Debtor alleges that the "Defendants assist the  
5 assignees and/or successors in interest" to the promissory note and  
6 deed of trust in connection with recouping pre-petition claims from  
7 post-petition estate property resulting in systematic injury to  
8 debtors by means the allegedly improper escrow analyses described  
9 above, concealing the post-petition collection of pre-petition claims,  
10 and objecting to confirmation of chapter 13 plans based on the  
11 improper escrow analyses. Additionally, the Debtor alleges "some  
12 Defendants systematically earn attorney fees based on a privity with  
13 each of the assignees and/or successors in interest during this  
14 bankruptcy case." These allegations, however, are not sufficient to  
15 state a claim that any of the named defendants were involved in a  
16 civil conspiracy. The Debtor has not alleged any agreement between  
17 any of the named defendants to a common plan or design to commit a  
18 tortious act, nor has he alleged that any of the named defendants had  
19 actual knowledge that a tort was planned and that they concurred in  
20 the tortious scheme with knowledge of its unlawful purpose. This  
21 claim for relief also suffers from the same defects as the first,  
22 second and fourth claims for relief in that it also fails to  
23 distinguish between any of the named defendants with respect to the  
24 alleged civil conspiracy. For these reasons, the court dismisses the  
25 fifth claim for relief as to the Moving Defendants with leave to  
26 amend.

1 In amending the fifth claim for relief, the Debtor should also be  
2 aware of the procedural hurdle of Cal. Civ. Code § 1714.10 with  
3 respect to named defendant William Malcolm. Section 1714.10 prohibits  
4 claims for relief against an attorney for civil conspiracy which is  
5 based on the attorney's representation of the client from being  
6 included in a complaint unless the court enters an order allowing the  
7 pleading that includes the claim for civil conspiracy after the court  
8 determines that the party seeking to file the pleading has established  
9 a reasonable probability of prevailing in the action. Cal. Civ. Code  
10 § 1714.10(a). There are two exceptions to the procedural hurdle of §  
11 1714.10(a): (1) where the attorney has an independent legal duty to  
12 the plaintiff, or (2) the attorney's acts go beyond the performance of  
13 a professional duty to serve the client and involve a conspiracy to  
14 violate a legal duty in furtherance of the attorney's financial gain.  
15 See also Favila, 188 Cal. App. 4th at 207-210.

16 The court cautions the Debtor that the first amended complaint  
17 must clearly identify which of the remaining named defendants violated  
18 their legal rights and the specific manner in which they violated  
19 those rights; if the Debtor fails to do so those defendants who are  
20 not clearly connected with the acts complained of will be dismissed  
21 without leave to amend.

#### 22 5. Leave to Amend

23 The court recognizes that it "should grant leave to amend even if  
24 no request to amend the pleading was made, unless it determines that  
25 the pleading could not possibly be cured by the allegation of other  
26 facts." Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc),  
27  
28

1 quoting Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995). In  
2 other words, the court is not required to grant leave to amend when an  
3 amendment would be futile. See Toscano, 2007 U.S. Dist. LEXIS 81884  
4 (citing Gommer v. VISX, Inc., 298 F.3d 893, 898 (9th Cir. 2002)). In  
5 this case, the court dismisses Long Beach without leave to amend  
6 because the fact that Long Beach was the original lender has nothing  
7 to do with the present controversy regarding enforcement of a secured  
8 claim in the bankruptcy case. Furthermore, the deficiencies in the  
9 Debtor's claim for relief under 11 U.S.C. § 362(k)(1) cannot be cured  
10 by further factual enhancement as § 362(k)(1) creates no right of  
11 action. Furthermore, the dismissal of the Debtor's claim under §  
12 362(k)(1) is without prejudice to the Debtor's ability to amend his  
13 claim for violation of the automatic stay as set forth in this  
14 memorandum.

15 The court will issue a separate order consistent with this  
16 ruling.

17  
18  
19 Dated: SEP 30 2011

20   
21 United States Bankruptcy Judge  
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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

CERTIFICATE OF SERVICE

The undersigned deputy clerk in the office of the United States Bankruptcy Court for the Eastern District of California hereby certifies that a copy of the document to which this certificate is attached was served by mail to the following entities listed at the address(es) shown below.

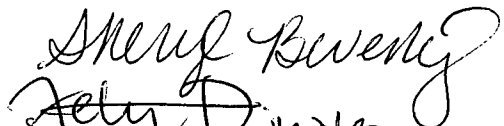
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OCT - 3 2011  
DATED: 9/30/11

By:   
Deputy Clerk